

**United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001**

'Notice: This is an electronic bench opinion which has not been verified as official'

Date: July 24, 1997

Case No. 94 INA 634

In the Matter of:

CORNET ENTERPRISES, INC., Employer

on behalf of

ALDA FLORENCIO, Alien

Appearance: Eliezer Kapuya, Esq., of Los Angeles, California

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from an alien labor certification application filed on behalf of Alda Florencio (Alien) by Cornet Enterprises (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer (CO) of the U.S. Department of Labor at San Francisco, California, the application, and the Employer and the Alien requested review pursuant to 20 CFR § 656.26.¹

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United`States who are able,

¹The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

STATEMENT OF THE CASE

In April 1993, the Employer, an Importer/Distributor, filed an application (ETA 750A)² to permit it to employ the Alien permanently as a Market Analyst with duties such as the research of market conditions in local, regional or national areas to determine potential sales of its products.³ As originally filed, the ETA 750A specified that the position was for 40 hours per week and was to pay \$2,000.00 per month.

The application was accompanied by a Statement of the Qualifications of Alien (ETA 750B) wherein it was represented that the Alien was currently living in the United States under a H-1 visa. Under § 15 of the ETA 750B, which required that the Alien list all jobs held during the past three years, the only employment reported was from July 1988 to February 1991 as a Market Research Analyst for a telephone company in the Philippine Republic.

On September 18, 1993, the state agency responsible for the initial processing of the application, the California Employment Development Department (EDD), informed the Employer that the prevailing wage for the position was \$2458.00 per month and that it would be required to increase its wage offer or submit documentation justifying the original wage offer. The Employer was advised further that EDD records showed that because the Employer had only five employees, it was required to justify its need for a Market Analyst on a full time basis. The Employer responded,

Our business is currently expanding as an importer and exporter of consumer electronics. We deal with wholesalers/retailers/dealers in various areas in California, Texas, Chicago, Arizona, Ohio, Pennsylvania, Florida, throughout the United States and Mexico. We are in need of a Marketing Research Analyst who is well versed in

²050.067-014 **Market research Analyst I** (profess. & kin.) Researches market conditions in local, regional, or national area to determine potential sales of product or service: Establishes research methodology and designs format for data gathering, such as surveys, opinion polls, or questionnaires. Examines and analyzes, statistical data to forecast future marketing trends. Gathers data on competitors and analyzes prices, sales, and methods of marketing and distribution. Collects data on customer preferences and buying habits. Prepares reports and graphic illustrations of findings.

³Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

developing marketing systems on a full time basis who could determine the proper marketing strategies that could be a great help to our expansion.

The Employer said also that it was increasing its wage offer to \$2,458.00 per month.

Recruitment. As a result of its recruitment efforts, fifteen applicants were referred to the Employer by EDD on December 15, 1993 and three more resumes were referred on February 2, 1994. In its report of February 28, 1994, the Employer said letters were sent to all eighteen applicants to invite them to call for an interview appointment, but only twelve answered. Eleven of these applicants were interviewed and rejected for the position because they "did not meet the requirements for the job offered." The remaining candidate failed to keep his interview appointment.

In referring the record to the CO, the EDD sent a copy of Employer's Quarterly Contribution Return, which shows that during the second quarter of 1993, the Alien had earned \$2,490.71 while working for the Company. The EDD also included responses to the questionnaires it had sent to several of the rejected applicants. One of the responses was from a John LaChance who reported that he had been interviewed by phone and was left with the impression that the interview "was basically intended to discourage applicants with a long list of negatives about the job." He added that he was quoted a salary of only \$22,000 to \$24,000 per year, not \$2458 per month, and he was told that he would have to relocate out of State.

Notice of Findings. The CO issued a Notice of Findings (NOF), in which he proposed to deny certification because the Employer failed to (1) describe the job available with specificity; (2) document good faith effort to recruit U.S. applicants; (3) lawfully reject qualified U.S. workers; (4) complete the ETA 750B; (4) document that a full time, permanent position exists.

As to Employer's failure to document a good faith effort to recruit U.S. workers, the CO noted that,

On an EDD follow-up questionnaire, applicant John LaChance stated that during a telephone interview "designed to discourage" applicants, the employer stated that the wage offered was \$22,000 to \$24,000 per year, significantly lower than the wage stated on the ETA750A, \$2458 per month (i.e., 29,496 per year.) By offering applicants a wage lower than that stated on the application, the employer described the job with terms less favorable to the alien, 20 CFR 656.21 (g)(8).

The CO then said that the Alien's work history was incomplete, as

shown on the ETA 750B, in that no employment is given for the period after February 1991, while the EDD records establish that the Alien was working for the Employer at that time. In addition, the wages being paid to the Alien indicated that this was a part-time position. Employer was directed to document that the job it was offering was, in fact, full time by submitting answers to the following together with supporting documentation:

Who has been performing the job duties of the marketing analyst in the past two years? Has this been a full-time position?

If the job of marketing analyst has not been full-time in the past, when will it become full time? How has the employer's business increased to justify the need for a full-time marketing specialist?

Is the employer able to pay the offered wage, \$2458 per month?

Rebuttal. In the Employer's rebuttal to the NOF, which was signed by its President (Morad Harir) and by the Alien, it alleged,

Mr. John La Chance was interviewed by the employer. See the enclosed questions that were asked from the applicant. Never did the employer change the wage. What would be the employer's purpose in doing it with this applicant. Mr. La Chance was offered the same salary as were all the applicants. Again please see the questionnaire which attests to the rate which was offered this applicant.

In addition, the rebuttal included a form that appears to be a record of an interview with Mr. La Chance, and includes the following preprinted question, which purportedly was answered in the affirmative:

The salary being offered for this position is 2,458/Mo We want to let you know that we are not offering any additional benefits, would you still be interested with this position?

In response to inquiries as to the Alien's work history, the Employer said she had been working for the Employer as a market research analyst on a part time basis since January 1993. The Employer then asserted,

The applicant is expected to work full time as soon as she gets her green card. The employer's business has been fluctuating and rapidly growing. Hence there is the need for a marketing specialist. The more the specialist will work, the more possible insight will be obtained, the more

possible revenues will be obtained by the company which has been expanding. The employer can certainly pay the offered wage. The employer has the financial resources to pay wage.

Employer's rebuttal included what appears to be a print-out of wages that it paid the Alien each week from February 5, 1993 to June 10, 1994. It shows that she worked eleven and a fraction hours per week and was paid at the rate of \$17.21 per hour. Employer also submitted copies of its product line, its catalog, and invoices, graphs, and a market survey form.

Final Determination. In the Final Determination that the CO issued on August 3, 1994, certification was denied because, inter alia, the Employer had failed to document that a full time job opportunity exists for a market analyst.

Appeal. Employer thereafter requested a review of the denial and the Appellate File was submitted to the Board.

DISCUSSION

Under 20 CFR § 656.30, "Employment" means permanent full-time work by an employee for an employer other than oneself." The Board has held that an employer bears the burden of proving that a position is permanent and full time. Certification may be denied, if the Employer's own evidence does not show that the position is permanent and full time, **Gerata Systems America, Inc.**, 88-INA-344 (Dec. 16, 1988). If the CO reasonably requests specific information to aid in the determination of whether a position is permanent and full time, the employer must provide it. **Collectors International, Ltd.**, 89-INA-133 (Dec. 14, 1989). In this regard the Board has held that where the job opportunity is to be created because of plans for expansion, a definite, detailed plan for expansion must be supplied. **BMW, Inc.**, 91-INA-355 (May 14, 1993); **Rick Trading Corp.**, 92-INA-375 (Aug 26, 1993).

If the Alien's work for Employer is an element of its proof, it is incumbent upon the Employer to demonstrate by more than its own representations that there are plans for expansion which warrant converting the position to full time. The Board is not entirely convinced that this is factual. The Alien's purported salary printout contains various instances of fractional hours of work, a form of record keeping that is unusual---e.g., 11.34, 11.77, 11.54, and 11.83 hours. The Alien's working 11.34 hours, for example, would mean that she worked 11 hours, 20 minutes, and twenty-four seconds; 11.77 would translate into 11 hours, 46 minutes, and twelve seconds. On its face the representation that this Employer has kept time records to a fraction of a minute does not appear consistent with common business practice and requires supporting evidence of its verisimilitude. If she did,

in fact, earn \$17.71 per hour, she has been paid at the rate of \$708.40 per week or \$3,070, per month. It is difficult to accept the Employer's undocumented assertion that it is paying the Alien the gross weekly wage that is set out on the purported salary summary for only part time work when it is considered that this Employer had to be coaxed into offering as much as \$2458 per month in its recruiting advertisement for this position. If the Employer's printout is believed, then this is an admission that the Employer has been paying the Alien at a rate materially in excess of that offered to U.S. workers to perform the same work as a full time employee.⁴

The Employer claimed, moreover, that its business already has been significantly expanded by the Alien's work in her part time employment on this job, but he failed to establish that the full time employment of the Alien or any other person in this position would accelerate that rate of expansion. Finally, it is difficult to understand why the Employer felt impelled to await the Alien's receiving a "green card" before converting her to full time employment if, as it indicated, she already has an H-1 Visa status.

Summary. As the Board concludes that the CO correctly denied certification on the grounds that the Employer failed to document the existence of a full time, permanent position, the remaining issues to determine whether this application was properly denied on other grounds have become moot.

ORDER

The Certifying Officer's denial of labor certification is hereby affirmed.

For the panel:

FREDERICK D. NEUSNER
Administrative Law Judge

I concur in the result.

JOHN C. HOLMES

⁴The Board finds it disturbing that this Alien's employment with the Employer was not disclosed in the ETA 750B and was not revealed until after the NOF had placed Employer on notice that a record of such employment existed. Employer's disingenuous conduct in this respect materially reduced the credibility of its assertions and of the other evidence that it submitted in support of this application.

Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

CASE NO. 94-INA-634

CORNET ENTERPRISES, INC., Employer
ALDA FLORENCIO, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	:	:	:	:
	:	CONCUR	:	DISSENT
	:	:	:	COMMENT
	:	:	:	:
Holmes	:	:	:	:
	:	:	:	:
	:	:	:	:
Huddleston	:	:	:	:
	:	:	:	:
	:	:	:	:

Thank you,

Judge Neusner

Date: June 2, 1997